Filed 12/04/200 **NF** Page 1 of 40 **FILED** 

DECEMBER 4, 2007
MICHAEL W. DOBBINS

3006159-LRB/TNP

### UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MELISSA MANNING	)	
Plaintiff,	)	
v.	) ) <b>No.</b>	07 C 6855
SMITHWAY MOTOR XPRESS, INC.	).	
and SHAYNE ABRAM MELTON	)	JUDGE KENNELLY MAGISTRATE JUDGE KEYS
Defendants.	)	

### NOTICE OF REMOVAL

NOW COMES the Defendant, SMITHWAY MOTOR XPRESS, INC., by its attorneys, LEW R.C. BRICKER, TANYA N. PETERMANN and SMITHAMUNDSEN LLC, and pursuant to 28 USC §§ 1332, 1441 and 1446, removes this action to the United States District Court for the Northern District of Illinois, Eastern Division, and in support thereof, state as follows:

- 1. The movant's Notice of Removal is based upon subject matter jurisdiction conferred by diversity of citizenship, as established in 28 U.S.C. § 1332.
- 2. Upon information and belief, the named plaintiff is currently and was at the time of the subject accident a citizen and resident of the State of Illinois. (See the Illinois Traffic Crash Report attached as Exhibit "A" and Affidavit of Tanya N. Petermann attached as Exhibit "B.")
- 3. The Defendant, SMITHWAY MOTOR XPRESS, INC., has its principal place of business in Iowa and has maintained its principal place of business in Iowa at all relevant times. (See the Affidavit of Chuck Fredricksen attached as Exhibit "C," the Internet Contact Us page of SMITHWAY MOTOR XPRESS, INC., attached as Exhibit "D," and "Secretary of State of Illinois" page regarding Business Services, attached as Exhibit "E.") SMITHWAY MOTOR

XPRESS, INC. is currently and has been an Iowa corporation since November 4, 2005, the date of the incident that is the subject of the plaintiff's lawsuit. (Exhibits "C" and "E.") Further, the plaintiff served SMITHWAY MOTOR XPRESS, INC., in Fort Dodge, Iowa. (See Summons attached as Exhibit "F.")

- 4. The Defendant, SHAYNE ABRAM MELTON, is believed to be a resident and citizen of the State of Utah. (*See* Exhibit "C.") The Defendant, SHAYNE ABRAM MELTON, was a resident of Utah at the time of the occurrence. (Exhibit "C.")
- 5. In her Complaint, the plaintiff alleges that the action stems from a motor vehicle collision occurring in Cook County, Illinois. (See the Plaintiff's Complaint At Law attached as Exhibit "G.)
- 6. The Complaint further alleges that the motor vehicle collision caused the Plaintiff, Melissa Manning, to have "sustained severe and permanent injuries." Further, Plaintiff's counsel also relayed to defense counsel that Manning sustained back/spine injuries. (Exhibit "G" at Count I, Paragraph 6 and Letter to Plaintiff's Counsel dated November 28, 2007, attached as Exhibit "H.")
- 7. Plaintiff's counsel also indicated that this matter exceeds the jurisdictional limit of \$75,000.00. (Exhibit "H.")
- 8. Given the nature of the allegations and plaintiff's counsel's representation, the movant believes in good faith that the amount in controversy exceeds the jurisdictional limit of \$75,000.00, exclusive of interest and costs.
  - 9. There is diversity of citizenship between the Plaintiff and Defendants.
- 10. Plaintiff's complaint was filed on October 26, 2007. (Exhibit "G" and the Cook County Case Online Information Summary attached as Exhibit "I"). Service was achieved on

Case 1:07-cv-06855

Document 1

the movant, SMITHWAY MOTOR XPRESS, INC. on November 6, 2007. (Exhibit "F.")1 This Notice was filed within thirty (30) days of "the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b).

- 28 U.S.C. §1446(a) requires that all defendants join the notice of removal or to 11. consent to the removal. Northern Illinois Gas Co. v. Airco Industrial Gases, 676 F.2d 270, 272 (7th Cir. 1982). The movant, Smithway Motor Xpress, Inc., brings this Notice of Removal. Counsel for Smithway Motor Xpress, Inc., has not obtained the consent of Defendant, Shayne Abram Melton, because, upon information and belief, he has not been served with Summons and Complaint at the time of filing of this notice. (Exhibit "H.") There is an exception to the rule that every defendant must either join in or consent to the notice of removal (formerly petition for removal). The consent of a defendant who has not been served is not required. See Great American Ins. Co. v. K & R Transportation, Inc., No. 04C1451, 2004 U.S. Dist. LEXIS 8695 \*5 (N.D. Ill. May 14, 2004) (attached as Exhibit "J").<sup>2</sup>
- 12. As required by 28 U.S.C. § 1446(d), the movant will promptly serve upon Plaintiff's counsel and file with the Circuit Court of Cook County, a true and correct copy of this Notice.
  - By removing this action, the movant does not waive any defenses available to it. 13.
- If any question arises as to the propriety of the removal of this action, the movant 14. requests the opportunity to present a brief and oral argument in support of its position that this case is removable.

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<sup>&</sup>lt;sup>1</sup> The Summons (Exhibit "F") upon Smithway Motor Xpress, Inc. reflects the date of receipt in the middle of the document.

<sup>&</sup>lt;sup>2</sup> Should service have been achieved on this codefendant, the movant requests the opportunity to secure his consent.

15. This Notice is signed in compliance with Rule 11 of the Federal Rules of Civil Procedure.

WHEREFORE, Defendant, SMITHWAY MOTOR XPRESS, INC., prays that this Honorable Court retain jurisdiction of the matter pursuant to 28 U.S.C. §§ 1332, 1441 and 1446.

Respectfully Submitted,

SmithAmundsen LLC

s/ Lew R. C. Bricker

Lew R. C. Bricker – Bar Number: 6206641 Attorney for Defendant, SmithAmundsen LLC 150 North Michigan Avenue, Suite 3300

Chicago, IL 60601

Telephone: (312) 894-3200 Fax: (312) 894-3210

E-Mail: lbricker@osalaw.com

Lew R. C. Bricker
Tanya N. Petermann
Attorney for Defendant, Smithway Motor Xpress, Inc.
SMITHAMUNDSEN LLC
150 North Michigan Avenue
Suite 3300
Chicago, Illinois 60601
(312) 894-3200

## **EXHIBIT "A"**

Illinois Traffic Crash Report

VEHICLE CONFIGURATION CARGO BODY TYPE LOAD TYPE	PREPARED BY - SIGNATURE STAR NO.   DATE (Day-Mac/fr) APPROVED BY SIGNATURE STAR NO.
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## **EXHIBIT "B"**

Affidavit of Tanya N. Petermann

3006159-LRB/TNP

### UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MELISSA MANNING	)
Plaintiff,	)
v.	) <b>No.</b>
SMITHWAY MOTOR XPRESS, INC.	)
and SHAYNE ABRAM MELTON	)
Defendants.	)
Delendants.	J

### AFFIDAVIT OF TANYA N. PETERMANN

I, TANYA N. PETERMANN, first being sworn, do depose and state:

- 1. I am an attorney with SmithAmundsen LLC and serving as an attorney for Smithway Motor Xpress, Inc. in the matter of Manning v. Smithway Motor Xpress, Inc. and Shayne Abram Melton, originally filed in the Circuit Court of Cook County, Illinois, County Department, Law Division No. 07 L 012144.
- 2. I am of sound mind and make this affidavit based upon my own personal knowledge.
- 3. I have conducted a thorough investigation into the matters surrounding the aforementioned case and have personal knowledge, gained through this investigation, of the facts set forth in this affidavit.
- 4. After investigation I believe that Plaintiff, Melissa Manning, was a resident and citizen of Chicago, Illinois on November 4, 2005.
- 5. My office received medical records that indicate Plaintiff, Melissa Manning, was a resident and citizen of Chicago, Illinois on November 4, 2005. (See redacted medical records attached as Exhibit "1.")

- 6. After investigation I believe that Plaintiff, Melissa Manning, is currently a resident and citizen of Chicago, Illinois.
- 7. Plaintiff's attorney has advised that plaintiff, Melissa Manning, sustained back/spine injury, and the amount the plaintiff seeks for resolution of this matter exceeds \$75,000.00.

FURTHER AFFIANT SAYETH NAUGHT.

ANYAN. PETERMANN

SUBSCRIBED AND SWORN TO

before me this

\_day of December, 2007.

Notary Public

OFFICIAL SEAL
MARIA S. WERNES
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 7-30-2008



Mercy Hospital and Medical Center 2525 S. Michigan Ave. Chicago, IL 60616-2477 (312) 567-2000



### **ADMISSION RECORD**

### PATIENT DEMOGRAPHIC INFORMATION

NAME: MANNING, MELISSA J DOB: 03/19/68 SEX: F FEMALE AGE: 37Y

ADDRESS: 2350 S STATE APT 306
CITY: CHICAGO
STATE: IL ZIP CODE: 60616
COUNTY: COOK
HOME PHONE: (312)808-1729
WORK PHONE:
MARITAL STATUS: S
PHONE MESSAGE: Yes
CONFIDENTIAL ADDRESS/PHONE: No

ACCOLINE # 05340 00014

ADMIT DATE: 11/06/05 PRINT DATE: 11/06/05

## **EXHIBIT "C"**

Affidavit of Chuck Fredericksen

ARDC 6206641

# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

**MELISSA MANNING** 

Plaintiff,

V.

SMITHWAY MOTOR XPRESS, INC. and SHAYNE ABRAM MELTON Defendants.

### AFFIDAVIT OF CHARLES D. FREDERICKSEN

- I, Charles Fredericksen, being duly sworn on oath, do offer and state that if I am called upon to testify under oath, I could truly, competently and on personal knowledge, state as follows:
  - 1. I am the Insurance Manager for Smithway Motor Xpress, Inc.
- 2. The principal place of business today and on November 4, 2005 of Smithway Motor Xpress, Inc. is and was Fort Dodge, Iowa.
- 3. Smithway Motor Xpress, Inc. is incorporated in the State of Iowa and has been since November 4, 2005.
- 4. Smithway Motor Xpress, Inc. was served with the Summons and Complaint in this matter on November 6, 2007.
- 5. Based on the business records of Smithway Motor Xpress, Inc. kept in the ordinary course of business and investigation, Shayne Abram Melton was a resident of the State of Utah on November 4, 2005 and remains so through today.

### AFFIDAVIT OF CHARLES D. FREDERICKSEN —PAGE 2

FURTHER AFFIANT SAYETH NOT.

Chuck Fredericksen

Subscribed and Sworn to Before me this 27 day of November, 2007

Notary Publica (seal)

PAULA ELBERT
Commission Number 182859
My Commission Expires

## **EXHIBIT "D"**

Internet Contact Us page of Smithway Motor Xpress, Inc.





About Smithway **Customer Solutions** Company Drivers Independent Contractors **Employment Opportunities** Contact Us



### **Contact Us**

### **Corporate Headquarters Address:**

Smithway Motor Xpress, Inc. P.O. Box 404 Fort Dodge, IA 50501

#### **Contact Phone Numbers:**

Local: 515.576.7418 Toll Free: 800.247.4972

#### General Email

#### **Terminals**

Make a move in the right direction™ ...

For Customer Solutions, contact the Marketing and Sales Department.

For Company and/or Independent Contractor Driving Information and Employment C contact the Human Resources Department.

To obtain a Smithway/East West Driver and/or Independent Contractor Online Applica here.

For all other inquiries, please use the links below:

Accounting Central Dispatch Hiring and Benefits Company Drivers and Owner Operators

Company Drivers, Owner Operators & Office Pay

Computers and Software

**Customer Credit and Payments** 

**Customer Receipts** 

Customer Relations, Freight Movements,

Contracts

**Driver Paperwork** 

Fuel, Phones, Driver Vouchers

Health and Equipment Insurance

Loads Brokered to Others

Logs, Permits, Licensing, Accident

Management

**Outside Repairs** 

**Prospective Driver Candidates** 



Facilities, Tires, Parts, Mechanics Freight Rate Quotations

Sale of Used Equipment, Tractors All Other Inquires



Home | About Smithway | Customer Solutions | Company Drivers | Independent Contractors Employment Opportunities | Contact Us

### Tariff Rules | Privacy Policy

© 2007 Smithway Motor Xpress Corp. | Site Map Web design and development by Spindustry Systems and Smart Solutions Group

## **EXHIBIT "E"**

Secretary of State of Illinois page regarding Business Services



SERVICES

ROGRAMS

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DEDARTMENTS

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### **CORPORATION FILE DETAIL REPORT**

Entity Name	SMITHWAY MOTOR XPRESS, INC.	File Number	53996477
Status	GOODSTANDING		
Entity Type	CORPORATION	Type of Corp	FOREIGN BCA
Qualification Date (Foreign)	10/07/1985	State	IOWA
Agent Name	NATIONAL REGISTERED AGENTS INC	Agent Change Date	04/10/2007
Agent Street Address	200 WEST ADAMS STREET	President Name & Address	G LARRY OWENS 2031 QUAIL AVE FORT DODGE IA 50501
Agent City	CHICAGO	Secretary Name & Address	G LARRY OWENS 2031 QUAIL AVE FORT DODGE IA 50501
Agent Zip	60606	Duration Date	PERPETUAL
Annual Report Filing Date	09/06/2007	For Year	2007

Return to the Search Screen

Purchase Certificate of Good Standing

(One Certificate per Transaction)

BACK TO CYBERDRIVEHLINGIS.COM HOME PAGE

## **EXHIBIT "F"**

Summons to Smithway Motor Xpress, Inc.

Transmitted by: Cecilia Villalpando

The information contained in this Summary Transmittal Form is provided by National Registered Agents, Inc. for informational purposes only and should not be considered a legal opinion. It is the responsibility of the parties receiving this form to review the legal documents forwarded and to take appropriate action.

SOP Transmittal # IL49907

11/19/2007 16:02

8476192923

### NATIONAL REGISTERED AGENTS, INC.

### SERVICE OF PROCESS SUMMARY TRANSMITTAL FORM

To:	DOUGLAS C. SANDVIG SMITHWAY MOTOR XPRESS, INC.	SOP Transmittal # IL49907
	2031 QUAIL AVENUE FORT DODGE, IA 50501-	(800) 767-1553 - Telephone (609) 716-0820 - Fax
	10111 202027 11712111	
(Entity	endant: SMITHWAY MOTOR XPRESS, INC SOLVED)	
the S	osed herewith are legal documents received on state of ILLINOIS on this 6 ived:	behalf of the above captioned entity by National Registered Agents, Inc. or its Affiliate in day of November , 2007 . The following is a summary of the document(s)
1.	Title of Action: MELISSA MANNING-	VS- SMITHWAY MOTOR XPRESS, INC. et al
2.	Document(s) served:	
	<ul> <li>Summons</li> <li>Complaint</li> <li>Petition</li> <li>Garnishment</li> </ul> Subpoena <ul> <li>Third Party</li> <li>Demand for</li> <li>Default Jud</li> </ul>	Injunction  y Complaint Notice of  or Jury Trial Mechanics Lien  dgement Other:
3.	Case & Docket Number: 2007L01214	CUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVI 4
4.	Amount Claimed, if any:	
5.	Method of Service (releat one):  ★ Personally served by: Delivered Via:  Certified M (Envelope enclose)	fail Regular Mail Facsimile
6.	Date and Time of Service: 11/6/2007	2:38:52 PM CST (GMT -6)
7.	Appearance/Answer Date: 30 Days	
8.	Plaintiff's Attorney:	9. Federal Express Airbill #798303319686
	(Name, Address & Telephone Number) JOHN T. CICHON 77 W. WACKER I. SUITE 4025 CHICAGO, IL 606 312-346-9241	DRIVE 10. Call Made to: VM - DOUGLAS C. SANDVIG
11.	Special Comments:	
		ı
NA	TIONAL REGISTERED AGENTS, INC.	Copies To:

Transmitted by: Cecilia Villalpando

The information contained in this Summary Transmittal Form is provided by National Registered Agents, Inc. for informational purposes only and should not be considered a legal opinion. It is the responsibility of the parties receiving this form to review the legal documents forwarded and to take appropriate action.

2120 - Served

8476192923 11/19/2007 15:02

LIBERTY MUTUAL

2121 - Served 2221 - Not Served 2321 - Served By Mail

2220 - Not Served 2320 - Served By Mail 2420 - Served By Publication SUMMONS	2221 - Not Served 2321 - Served By Mail 2421 - Served By Publication ALIAS - SUMMONS	CCG N	001-10M-1-07-05 (	<u>)</u>
	THE CIRCUIT COURT OF CO	OK COU LAW	NTY, ILLINOIS  DIVISION	
(Name all parties)		1	2007L012144 CALENCARIRORA A	
MELISSA MANNING		- (	FIME 60*00 PI Motor Vehicle	
SMITHWAY MOTOR XPRESS, T	AC.		No	
SHAYNE ABRAM MELTON		- <b>J</b>	SHERIFF PLEASE SERVE: Smithway Motor Xpress, INC.	
	SUMMO	NS	c/o National Registered Agents, Inc. 200 W. Adams Street Chicago, IL 60606	
To each Defendant:				
YOU ARE SUMMON! hereto attached, or otherwise fil following location:	ED and required to file an answer to the second pay the r	wer to th equired fe	e complaint in this case, a copy of which is ee, in the Office of the Clerk of this Court at the	is ie
Zi Richard J. Daley Ce	enter, 50 W. Washington, Room	801	Chicago, Illinois 60602	
District 2 - Skokie 5600 Old Orchard R Skokie, IL 60077	District 3 - Rolling l d. 2121 Euclid Rolling Meadows, I		District 4 - Maywood 1500 Maybrook Ave. Maywood, IL 60153	
District 5 - Bridgevic 10220 S. 76th Ave. Bridgeview, IL 6045	16501 S. Kedzie Pk	wy.	Child Support 28 North Clark St., Room 200 Chicago, Illinois 60602	
You must file within 30 days af IF YOU FAIL TO DO SO, A . REQUESTED IN THE COM	ter service of this Summons, not of FUDGMENT BY DEFAULT MA PLAINT.	ounting t	he day of service. ITERED AGAINST YOU FOR THE RELIE	F
To the officer:				_

This Summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and fees, if any, immediately after service. If service cannot be made, this Summons shall be returned so endorsed. This Summons may not be served later than 30 days after its date.

Atty. No.: 39532	witness, 2007, 2007,
Name: John T. Cichon	
Atty. for: Plaintiff	Clerk of Court
Address: 77 W. Wacker Drive, Suite 4025	<u> </u>
City/State/Zip: Chicago, IL 60601	Date of service: (To be inserted by officer on copy left with defendant
Telephone: (312) 346-9241	or other person)
Service by Facsimile Transmission will be accepted at:	
	(Arca Code) (Facsimile Telephone Number)

11/19/2007 16:02

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LIBERTY MUTUAL

2121 - Served 2120 - Served 2221 - Not Served 2220 - Not Served 2321 - Served By Mail 2320 - Served By Mail

2421 - Served By Publication 2420 - Served By Publication **ALIAS - SUMMONS** CCG N001-10M-1-07-05 ( **SUMMONS** IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS DIVISION COUNTY DEPARTMENT, 5人 化氯氯氯化盐 Jaceks 🕏 29505 A (Name all parties) MELISSA MANNING Motor Venuela SMITHWAY MOTOR XPRESS, INC. SHERIFF PLEASE SERVE: SHAYNE ABRAM MELTON Smithway Motor Xpress, INC. c/o National Registered Agents, Inc. 200 W. Adams Street **SUMMONS** Chicago, IL 60606 To each Defendant: YOU ARE SUMMONED and required to file an answer to the complaint in this case, a copy of which is bereto attached, or otherwise file your appearance, and pay the required fee, in the Office of the Clerk of this Court at the following location: \_, Chicago, Illinois 60602 Richard J. Daley Center, 50 W. Washington, Room \_\_\_\_\_ District 4 - Maywood ☐ District 3 - Rolling Meadows District 2 - Skokie 1500 Maybrook Ave. 2121 Euclid 5600 Old Orchard Rd. Maywood, IL 60153 Rolling Meadows, 1L 60008 Skokie, IL 60077 ☐ Child Support ☐ District 6 - Markham ☐ District 5 - Bridgeview 28 North Clark St., Room 200 16501 S. Kedzie Pkwy. 10220 S. 76th Ave. Chicago, Illinois 60602 Markham, JL 60426 Bridgeview, IL 60455 You must file within 30 days after service of this Summons, not counting the day of service. IF YOU FAIL TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE RELIEF REQUESTED IN THE COMPLAINT. To the officer: This Summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and fees, if any, immediately after service. If service cannot be made, this Summons shall be returned so endorsed. This Summons may not be served later than 30 days after its date. WITNESS Atty. No.: 39532 Name: John T. Cichon Atty. for: Plaintiff Clerk of Court Address: 77 W. Wacker Drive, Suite 4025 Date of services City/State/Zip: Chicago, IL 60601 (To be inserted by officer on copy left with defendant or other person) Telephone: (312) 346-9241 Service by Facsimile Transmission will be accepted at:

(Area Code) (Facsimile Telephone Number)

## **EXHIBIT "G"**

Plaintiff's Complaint at Law

LIBERTY MUTUAL

PAGE 06/08

# IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

MELISSA MANNING Plaintiff,	) }
vs.	CASE NO.: 1000 75 0 3 00 0 0
SMITHWAY MOTOR XPRESS, INC. and	
SHAYNE ABRAM MELTON Defendants.  COMPL	) AINT AT LAW

Plaintiff, MELISSA MANNING, complaining against the Defendants, SMITHWAY MOTOR XPRESS, INC. and SHAYNE ABRAM MELTON, states as follows:

COUNT I

- 1. On and prior to November 4, 2005, 51<sup>st</sup> Street was a much used and well traveled public highway extending in a generally easterly and westerly direction and was intersected by Wentworth Avenue another much used and well traveled public highway extending in a generally northerly and southerly direction and said highways and said intersection were located in the City of Chicago, County of Cook, State of Illinois.
- 2. Traffic for 51<sup>st</sup> Street at said intersection was regulated by a traffic signal alternately displaying, red, yellow and green lights.
- 3. On November 4, 2005, the Plaintiff, MELISSA MANNING, was operating a vehicle in an easterly direction on 51<sup>st</sup> Street and was in the process of making a left turn onto Wentworth Avenue so as to proceed in a northerly direction.
- 4. At said time and place, the Defendant, SMITHWAY MOTOR XPRESS, INC., owned and its agent and servant, Defendant, SHAYNE ABRAM MELTON was operating a semi-tractor trailer in an easterly direction in the right outer lane of 51<sup>st</sup> Street and at the time of the occurrence complained of herein, Defendant, SHAYNE ABRAM MELTON while

11/19/2007 16:02 8476192923

attempting a left turn onto northbound Wentworth Avenue drove his semi-tractor trailer from the right outer lane of 51<sup>st</sup> Street into the left inner lane of traffic on 51<sup>st</sup> Street.

- 5. At said time and place, the Defendant, SMITHWAY MOTOR XPRESS, INC. by and through its agent and servant the Defendant, SHAYNE ABRAM MELTON and the Defendant SHAYNE ABRAM MELTON, individually, carelessly and negligently:
  - a. Drove and operated said semi-tractor trailer;
  - Failed to keep a careful lookout ahead for other traffic;
  - Failed to keep proper control over said semi-tractor trailer while making a left turn;
  - d. Drove and operated said semi-tractor trailer by moving from the right outer lane into the left inner lane without first ascertaining whether or not such movement can be made with safety; Contrary to and in violation of the provisions of the 625 ILCS 5/11-709 of the Illinois Motor Vehicle Code;
  - e. Failed to stay within the appropriate lane for traffic while turning left onto northbound Wentworth Avenue;
  - f. Was otherwise careless and negligent in the operation of said semi-tractor trailer.
- 6. As a direct and proximate result and in consequence of one or more or said wrongful acts of the Defendants, their semi-tractor trailer struck Plaintiff's vehicle with great force and violence, causing the Plaintiff to be thrown about the inside of her said vehicle and thereby she sustained severe and permanent injuries; that as a result of her said injuries she has suffered and with reasonable certainty will continue to suffer great pain and discomfort; and she has been and will be hindered from attending to her usual affairs and duties and from following her usual occupation; and she has been and will be deprived of large carnings and profits which she would have otherwise realized; and she has incurred and will in the future continue to become liable for large sums of money for the care and treatment of her said injuries.

11/19/2007 16:02

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LIBERTY MUTUAL

PAGE 08/08

WHEREFORE, the Plaintiff, MELISSA MANNING, asks judgment against the Defendants, SHAYNE ABRAM MELTON and SMITHWAY MOTOR XPRESS, INC., in an amount in excess of FIFTY THOUSAND DOLLARS (\$50,000.00), exclusive of costs of suit herein.

POLANSKY, CICHON & BATEY, CHTD. 77 W. Wacker Drive, Suite 4025

Chicago, IL 60601-1635

Firm No.: 39532

Telephone: (312) 346-9241

(312) 704-4431 Telefax:

### **EXHIBIT "H"**

Letter to Plaintiff's Counsel dated November 28, 2007

Case 1:07-cv-06855

Document 1

Filed 12/04/2007

Page 30 of 40 PAGE. 01

NOV 28 2007 15:02 SMITHAMUNDSEN LLC

002

JOB #946

JOB STATUS REPORT \*\*

DATE TIME 001 11/28 15:01 TO/FROM #09497044431 EC--S

MODE

AS OF

MIN/SEC 00' 31"

STATUS PGS OK

## SmithAmundsen LLC

150 North Michigan Avenue **Suite 3300** Chicago, IL 60601 Phone: 312.894.3200

FAX: 312.894.3210

### **FACSIMILE TRANSMISSION**

TO:	Mr. John T. Cichon		FAX#:	(312) 704-4431
FROM:	Lew R. C. Bricker	· ·	DATE:	November 28, 2007
SA File:	Manning v. Smithwa	y Motor Express		
SA File No.:	3006159-LRB/TNP	;		
# PAGES IN	CLUDING COVER S	HEET 2		
COMMENTS	S:	-		
		<u> </u>		····

The information contained in this facsimile communication is attorney privileged and confidential information intended only for the use of the individual or entity to whom or to which it is addressed. If the recipient of this transmission is not the intended recipient, the recipient is notified that any dissemination, distribution, or reproduction of this communication is strictly prohibited. If you have received this communication in error, please notify SmithAmundsen LLC at the above telephone number and return the communication to SmithAmundsen LLC at the above telephone number and return the communication to SmithAmundsen LLC at the above address via fax. Thank you.

Illinois Offices: Rockford, Waukegan, St. Charles, Woodstock

Wisconsin Office: Milwaukee

### SmithAmundsen LLC

150 North Michigan Avenue Suite 3300 Chicago, IL 60601 Phone: 312.894.3200 FAX: 312.894.3210

## FACSIMILE TRANSMISSION

TO:	Mr. John T. Cichon	FAX#:	(312) 704-4431
FROM:	Lew R. C. Bricker	DATE:	November 28, 2007
SA File:	Manning v. Smithway Motor Express		
SA File No.:	3006159-LRB/TNP		
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COMMENTS	:		

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Lew R. C. Bricker Direct Dial: (312) 894-3224

November 28, 2007

VIA FACSIMILE (312) 704-4431

Mr. John T. Cichon Polansky, Cichon & Batey, Chtd. 77 W. Wacker Drive Suite 4025 Chicago, IL 60601

Re:

Melissa Manning v. Smithway Motor Xpress, Inc. and Shayne Abram Melton

Court No.:

04 L 12144

DOL:

11/4/05

Our File:

3006159-LRB/TNP

Dear Mr. Cichon:

Please permit this letter to confirm our discussion of today. You indicated during our conversation that this matter has a value in excess of \$75,000.00. You also indicated that your efforts at serving Mr. Melton with Summons and Complaint in this matter have gone unsuccessful thus far.

If my understanding of this information is incorrect in any manner, please let me know.

Sincerely,

Low C. Bricker

LRB/msw



## **EXHIBIT "I"**

**Cook County Case Online Information Summary** 



Case Information Summary for Case Number 2007-L-012144

Filing Date: 10/26/2007

Case Type: PERSONAL INJURY(MOTOR VEHICLE)

Division: Law Division

District: First Municipal

Ad Damnum: \$50000.00

Calendar: A

### **Party Information**

Plaintiff(s)

MANNING MELISSA

Attorney(s)

POLANSKY, CICHON&BATEY CHT

77 W WACKER #4025 CHICAGO IL, 60601

(312) 346-9241

**Date of Service** 

Defendant(s)

Attorney(s)

MELTON ABRAM SHAYNE

SMITHWAY MOTOR XPRESS INC

### Case Activity

Activity Date: 10/26/2007

Participant: MANNING MELISSA

PERSONAL INJURY (MOTOR VEHICLE) COMPLAINT FILED

Court Fee: 294.00

Attorney: POLANSKY, CICHON&BATEY CHT

Judgment Amount: 50000.00

Activity Date: 11/8/2007

Participant: SMITHWAY MOTOR XPRESS IN

SUMMONS SERVED - CORPORATION/COMPANY/BUSINESS

Court Date: 11/6/2007 Court Fee: 60.00

Activity Date: 11/21/2007

Participant: MANNING MELISSA

CASE MANAGEMENT CALL NOTICE MAILED

Court Date: 2/27/2008 Court Time: 1000

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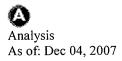
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## **EXHIBIT "J"**

Great American Ins. Co. v. K & R Transportation, Inc.

### LEXSEE 2004 US DIST. LEXIS 8695



## GREAT AMERICAN INSURANCE COMPANY, Plaintiff, v. K & R TRANSPORTATION, INC., and SONY ELECTRONICS, INC., Defendants.

#### No. 04 C 1451

## UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2004 U.S. Dist. LEXIS 8695

May 14, 2004, Decided May 17, 2004, Docketed

**SUBSEQUENT HISTORY:** Motion granted by Great Am. Ins. Co. v. K&R Transp., Inc., 2005 U.S. Dist. LEXIS 383 (N.D. Ill., Jan. 10, 2005)

**DISPOSITION:** [\*1] Plaintiff's motion to remand denied.

**COUNSEL:** For GREAT AMERICAN INSURANCE COMPANY, plaintiff: Robert Charles Moore, William L. Wood, Scott J Gartner, Stone & Moore, Chicago, IL.

For SONY ELECTRONICS INC., defendant: Bruce Craig Spitzer, Christopher A. Kreid, Metge, Spitzer & Kreid, Chicago, IL.

JUDGES: PAUL E. PLUNKETT, UNITED STATES DISTRICT JUDGE.

**OPINION BY: PAUL E. PLUNKETT** 

#### **OPINION**

### MEMORANDUM OPINION AND ORDER

Before the Court is plaintiff's 28 U.S.C. § 1447(c) motion to remand the action to the Illinois Circuit Court of Cook County. For the reasons stated below, the motion is denied.

### **Background**

Plaintiff Great American Insurance Company ("Great American") is an Ohio insurance company. K&R Transportation, Inc. ("K&R") is an Illinois corporation with its principal place of business in Waukegan, Illinois. Sony Electronics, Inc. ("Sony") is a Delaware corporation. In December 2003, Great American filed a complaint for declaratory judgment in Illinois state court against K&R and Sony. The complaint styled the action as one concerning the rights and obligations of Great American under certain inland marine insurance policies it issued to K&R.

Sony removed [\*2] this case to federal court in February 2004 under 28 U.S.C. § 1446, claiming diversity jurisdiction, jurisdiction under 28 U.S.C. § 1352 (bonds executed under federal law) and jurisdiction under 28 U.S.C. § 1337(a) (commerce and antitrust regulations). Great American has filed a motion to remand under 28 U.S.C. § 1447(c) on the grounds that Sony failed to obtain consent for removal from co-defendant K&R and that there is no federal question jurisdiction. Sony opposes the motion, saying that K&R's consent was unnecessary for the removal petition and that both diversity and federal question jurisdiction exist.

#### Discussion

We first address the issue of whether we have jurisdiction over this matter. This Court has jurisdiction over a removed case if the case could have been brought in federal court initially. 28 U.S.C. § 1441(a) (1994); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 96 L. Ed.

2d 318, 107 S. Ct. 2425 (1987). Jurisdiction must exist at the time of removal. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 293, 82 L. Ed. 845, 58 S. Ct. 586 (1938); [\*3] Shaw v. Dow Brands, Inc., 994 F.2d 364, 368 (7th Cir. 1993).

Sony argues that this Court's jurisdiction over this case is based on both diversity of citizenship and the existence of a federal question. Great American argues that there is no federal question jurisdiction because the action is a declaratory judgment action filed in state court to fix the rights of the parties under an insurance contract. Great American does not address the diversity issue.

We find that we do have jurisdiction over this case under the diversity requirements set out in 28 U.S.C. § 1332(a). First, complete diversity among the parties exists, Under 28 U.S.C. § 1332(c), a corporation is deemed to be a citizen of any state where it has been incorporated and of the state where it has its principal place of business. According to Sony's representations, Great American is an Ohio corporation with its principal place of business in Ohio, Sony is a Delaware corporation with its principal place of business in New Jersey and K&R is an Illinois corporation with its principal place of business in Illinois. (Notice of Removal at PP3, 4, 5.) Inasmuch [\*4] as Great American does not challenge these representations (in fact, it is silent in its memoranda on the issue of diversity), the Court will take them as true and thus finds the requisite diversity of citizenship. \(^1\) See 28 U.S.C. \(^3\) 1332(a)(1) (1993 and Supp. 2003). In addition, the Court finds that the amount in controversy is sufficient to support jurisdiction. <sup>2</sup> See id.; Compl. P15 (indicating \$ 261,559.40 potentially at issue).

> 1 In its complaint, Great American states that it and Sony are "licensed" in Illinois and K&R's principal place of business is in Illinois. (Compl. PP3, 4, 5.) For diversity of citizenship analysis, a corporation is deemed to be a citizen of any state where it is incorporated and of the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1) (1993). Where a corporation is licensed is not necessarily the same as where it has its principal place of business. See Maple Leaf Bakery v. Raychem Corp., 1999 U.S. Dist. LEXIS 18744, 1999 WL 1101326 (N.D. Ill. Nov. 29, 1999) (discussing Seventh Circuit's "nerve center test" for determining principal place of business of corporations). We find it curious that Great American would mention one party's principal place of business but omit that information with respect to the other parties to the action. We also note that 28 U.S.C. § 1441(b) does not preclude removal in this case because K&R, a citizen of

the state where the action is brought, was not served before the removal notice was filed. (Mot. to Remand Ex. C P2 (affidavit of Great American's counsel representing that K&R was served with the complaint and summons through its registered agent on February 26, 2004, two days after the notice of removal was filed).)

[\*5] 2 Having found diversity of citizenship jurisdiction exists, we need not address whether federal question jurisdiction exists.

We now address whether the removal procedure was deficient. Generally, all defendants must join in a removal petition or consent to such removal. Chicago, Rock Island, & Pac. Ry. Co. v. Martin, 178 U.S. 245, 248, 44 L. Ed. 1055, 20 S. Ct. 854 (1900); Northern Ill. Gas Co. v. Airco Indus. Gases, 676 F.2d 270, 272 (7th Cir. 1982). A petition that is not signed by all named defendants is considered defective if it does not explain the absence of a co-defendant. Northern Ill. Gas Co., 676 F.2d at 273. A removed matter must be remanded if there are any defects in the removal procedure. Shaw, 994 F.2d at 366.

Great American challenges Sony's notice of removal on the grounds that Sony failed to obtain K&R's consent to the removal and failed to affirmatively explain K&R's absence from the notice of removal. It is true that K&R has not joined in Sony's notice of removal. However, this does not make Sony's notice of removal [\*6] defective. The Seventh Circuit recognizes an exception to the joinder/consent rule for defendants who have not been served at the time the removal petition is filed. See Shaw, 994 F.2d at 369; P. P. Farmers' Elevator Co. v. Farmers Elevator Mut. Ins. Co., 395 F.2d 546, 547-48 (7th Cir. 1969). Sony filed its notice of removal on February 24, 2004; K&R was not served until February 26, 2004. (Mot. to Remand Ex. C.) Under this exception, K&R's consent was not required.

Great American goes on to say that Sony did not give that particular explanation in its notice. Instead, Sony states in its notice that K&R is no longer in business and therefore it could not obtain K&R's consent. Great American says that although K&R was dissolved in 2002, under Illinois law, an Illinois corporation survives its dissolution and can sue, be sued and be served via its registered agent for five years after dissolution. Thus, says Great American, Sony's explanation for K&R's absence from the notice of removal is not sufficient to have relieved Sony from obtaining K&R's consent to removal.

We are not persuaded by Great American's arguments. In its notice of removal, Sony [\*7] explained the steps it took to investigate K&R's legal status and its

2004 U.S. Dist. LEXIS 8695, \*

reasons for not including K&R's consent to the removal. It did not simply ignore K&R's existence or the requirement that K&R join in the notice of removal. Cf. Shaw, 994 F.2d at 368 (where defendant neglected to explain in notice of removal co-defendants' failure to consent to removal, court would not "punish" defendant for "technicality"). Moreover, Sony has provided evidence that it did make some attempt (albeit belatedly, it seems) to inquire about K&R's registered agent's intentions with respect to this litigation. (Opp'n to Mot. to Remand Ex. 1.) The registered agent's attorney has indicated that K&R will not be participating in this case. (Id.) We do not find Sony's notice of removal defective for its failure to include K&R's consent. See Shaw, 994 F.2d at 368-69 (notice of removal by only one defendant not defective because one co-defendant was served after notice of removal filed, one was dismissed before notice of removal filed and one was nominal party).

Having found jurisdiction exists and no defect in the removal procedure, Great American's motion to remand is denied [\*8] and its request for costs under 28 U.S.C. § 1447(c) is dismissed as moot.

### Conclusion

For the reasons stated above, Great American's motion to remand is denied.

UNITED STATES DISTRICT JUDGE

PAUL E. PLUNKETT

**DATED: MAY 14 2004** 

3006159-LRB/TNP ARDC: 6206641

### UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MELISSA MANNING	)	
Plaintiff,	)	
v.	)	No.
SMITHWAY MOTOR XPRESS, INC. and SHAYNE ABRAM MELTON	)	
Defendants.	)	

### **CERTIFICATE OF SERVICE**

I, Lew R. C. Bricker, hereby certify that on December 5, 2007, a copy of the foregoing **Notice of Removal** was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

### Parties receiving service electronically are as follows:

Mr. John T. Cichon Polansky, Cichon & Batey, Chtd. 77 W. Wacker Drive Suite 4025 Chicago, IL 60601

s/ Lew R. C. Bricker

Lew R. C. Bricker – Bar Number: 6206641

Attorney for Defendant, SmithAmundsen LLC

150 North Michigan Avenue, Suite 3300

Chicago, IL 60601

Telephone:

(312) 894-3200

Fax:

(312) 894-3210

E-Mail:

lbricker@osalaw.com

Attorney for Defendants SMITHAMUNDSEN LLC 150 North Michigan Avenue, Suite 3300 Chicago, Illinois 60601 (312) 894-3200